

ALANCO ENVIRONMENTAL RESOURCES CORP.

IBLA 94! 322

Decided September 10, 1998

Appeal from a decision of the Area Manager, Tucson Resource Area, Arizona, Bureau of Land Management, declaring millsite claimant to be in trespass by virtue of continued unauthorized use and occupancy of millsite claims, and requiring settlement of trespass. AZA! 27278.

Reversed.

1. Federal Land Policy and Management Act of 1976:
Surface Management! ! Millsites: Generally! ! Mining Claims: Millsites! ! Mining
Claims: Plan of Operations! ! Mining Claims: Surface Uses! ! Trespass: Generally

BLM may not charge a claimant with trespass, pursuant to 43 C.F.R. § 2920.1! 2, when he has failed to obtain BLM's prior approval, under 43 C.F.R. Subpart 3809, of a plan of operations for ongoing use and occupancy of his existing millsite claim, because that regulation only applies when a person fails to obtain authorization under 43 C.F.R. Part 2920, which is not applicable to activity authorized by the general mining laws.

APPEARANCES: John C. Lacy, Esq., Tucson, Arizona, for ALANCO Environmental Resources Corp.; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The ALANCO Environmental Resources Corporation (ALANCO) has appealed from a decision of the Area Manager, Tucson Resource Area, Arizona, Bureau of Land Management (BLM), dated January 19, 1994, declaring ALANCO to be in trespass under 43 C.F.R. § 2920.1! 2 by virtue of its continued use and occupancy of 15 unpatented millsite claims, the ARMCO Millsite Nos. 1

through 15 (A MC! 244496 through A MC! 244510), and requiring it to settle the trespass on or before February 28, 1994. 1/

The instant case began when, noting that it had no record of the filing of a plan of operations, as required by 43 C.F.R. Subpart 3809, BLM required ALANCO, by letter dated September 23, 1992, to submit, within 7 days of receipt of the letter, "a copy of the original * * * plan of operations" for its millsite operation in secs. 20 and 21, T. 20 S., R. 22 E., Gila and Salt River Meridian, Cochise County, Arizona, and "proof that it was filed with the [BLM]." 2/ It further stated that "[f]ailure to provide such documents may constitute a trespass."

ALANCO responded on September 28, 1992, submitting copies of various documents previously filed with the Arizona Department of Environmental Quality (ADEQ). ALANCO could not locate a copy of a plan of operations, or proof that one had been filed with BLM. See also Memorandum to the Files from BLM Geologist, dated Nov. 9, 1992 ("[ALANCO representative] said that he could not find any record that A[LANCO] had submitted a * * * plan of operations to the BLM"). BLM then informed ALANCO, by letter dated October 8, 1992, that, absent any BLM authorization, its

1/ The ARMCO millsite claims, which are independent millsites under 30 U.S.C. § 42 (1994), were originally located by ALANCO on Sept. 1, 1985, and copies of the notices of location were filed for recordation with BLM on Sept. 24, 1985, as required by section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (1994). The claims, which encompass about 75 acres of contiguous public land situated in the SE $\frac{1}{4}$ sec. 20 and the SW $\frac{1}{4}$ sec. 21, T. 20 S., R. 22 E., Gila and Salt River Meridian, Cochise County, Arizona, are the situs of the "Tombstone [now ARMCO] Mill," a milling facility first constructed in 1969 and later expanded. It was built in conjunction with four prior millsite claims, the Jodie No. 1 Mill Site through Jodie No. 4 Mill Site (A MC! 71997 through A MC! 71200), which covered about 20 acres of contiguous public land that is now entirely within the ARMCO millsite claim group.

2/ It is undisputed that the 20 $\frac{1}{2}$ acre area occupied by ALANCO's millsite operation, which is fenced with barbed wire, principally contained, at the time of BLM's initial inspection on Sept. 3, 1992, and thereafter, an assay laboratory/office building, a facility for screening/crushing ore, and a building containing milling equipment and a maintenance shop, as well as related tailings disposal areas, solution ponds, heap leaching pits, and various tanks. BLM also reported the presence, on Sept. 3, 1992, and Oct. 22, 1993, of a trailer/mobile home and trash and/or milling debris.

According to ALANCO, the area disturbed by its various structures and milling and other activities, which has remained constant since 1969, is 4.66 acres. (Statement of Reasons for Appeal (SOR), Attachment 1 (Affidavit of Anthony Lane, dated Mar. 10, 1994) at 2! 3; SOR, Attachment 2, Document 37.) BLM disputes that, asserting that the actual area of disturbance "exceeds five acres" (Answer at 4). In order to decide the instant appeal, we need not resolve that question.

millsite operation was deemed to be in violation of section 302 of FLPMA, as amended, 43 U.S.C. § 1732 (1994), and 43 C.F.R. Part 2920. ALANCO was ordered to cease all activities.

ALANCO submitted a "Plan of Operation" (AZA! 27524), dated October 20, 1992, on October 22, 1992, stating therein that it intended to reopen the milling facility, which had been largely idle since 1987, confining all its activities to the original 20! acre area. 3/

However, before BLM took any action on that plan, the Area Manager, on October 23, 1992, issued ALANCO a "Notice of Trespass," pursuant to 43 C.F.R. § 2920.1! 2, citing its unauthorized use and occupancy of the public lands in connection with the millsite operation. Without referencing receipt of the Plan of Operation, the Area Manager stated that, in order to resolve the trespass, ALANCO was required, within 90 days of receipt of the notice, to submit an "acceptable" plan of operations and reclamation bond, as required by 43 C.F.R. Subpart 3809. The Area Manager also stated that, with the exception of assay work within the laboratory, "[a]ll operations shall remain on hold." Finally, he stated that failure to resolve the trespass within the 90! day period might result in trespass penalties under 43 C.F.R. § 2920.1! 2 or a citation under 43 C.F.R. § 9262.1. ALANCO received the trespass notice on October 26, 1992, but there is no evidence that it ever appealed therefrom.

By letter dated December 8, 1992, BLM notified ALANCO that its October 20, 1992, plan of operations was "incomplete," and directed it to submit additional information required by 43 C.F.R. Subpart 3809 before BLM would further consider the plan. Such information was to include engineering designs and a leak detection and recovery system for tailings disposal areas, solution ponds, and heap leaching pits, a surface/ground water monitoring program, a spill contingency plan, and a reclamation plan. ALANCO submitted detailed information on January 25, 1993. By letter dated February 19, 1993, BLM required ALANCO to submit additional information to clarify aspects of its plan. ALANCO submitted information on February 26 and March 3, 1993. By letter dated April 26,

3/ ALANCO described past operations at the facility as follows:

"The Milling Facility was initially constructed in 1969 * * *. It operated sporadically from 1970 to 1979, but much of the time it was id[le], except for a considerable amount of laboratory work being completed. In 1979, the mill was reopened and a construction phase le[d] to actual operations transpiring in 1980. The mill was operated from 1980 through to 1985 on various ore supplies from the Tombstone [Mining] District [(Arizona)], Mexico, New Mexico and various other localities around the Southwestern United States. During this time, a full laboratory facility was maintained and operated at the facility. From 1985 to 1987 the mill was maintained, but little activity transpired. Since 1987, the mill has gone through some changes and repairs to put it back into operation. There has been minor production from the facility during that time." (Plan of Operation, dated Oct. 20, 1992, at 3.)

1993, BLM required ALANCO to respond to comments received, primarily from ADEQ, during its environmental review process. ALANCO submitted a detailed response on May 10, 1993.

On August 24, 1993, the Area Manager issued a decision, first disapproving ALANCO's plan of operations because it had failed, as specified by ADEQ, to comply with applicable State water quality standards by not obtaining an approved State permit ("Aquifer Protection Permit" (APP)) for discharges from its milling facility, including the assay laboratory. ^{4/} He next stated that the decision constituted a "Notice of Noncompliance," issued pursuant to 43 C.F.R. § 3809.3! ^{2/} primarily for continuing to operate a milling facility, including the assay laboratory, without an approved plan of operations. ALANCO was required to cease all operations, including operation of the laboratory, and, within 30 days of receipt of the decision, complete the cleanup and/or removal of trash, abandoned equipment, and scrap material north and east of the mill building. ^{5/} Finally, the Area Manager stated that, while ADEQ had allowed ALANCO to engage in interim repairs and modifications pending approval of an APP, ALANCO could not do so until a modified plan of operations covering such activity was approved by BLM, and required submission of such a plan within 30 days of receipt of the decision should ALANCO desire to pursue that activity. ALANCO received the Area Manager's August 1993 decision on August 26, 1993, but there is no evidence that it ever appealed therefrom. ^{6/}

Also, on August 24, 1993, the Area Manager issued ALANCO a "Second Notice of Trespass," pursuant to 43 C.F.R. § 2920.1! ^{2/} because of its "fail[ure] to resolve th[e trespass] informally," following issuance of the first trespass notice on October 23, 1992. He stated that, in order to do so, ALANCO must, within 30 days, complete the cleanup and/or removal of trash, abandoned equipment, and scrap material north and east of the mill building, submit an acceptable bond in the amount of \$19,000 to "ensure the removal of unauthorized facilities and reclamation," and submit a modified plan of operations "covering interim repairs and modifications." The Area Manager further informed ALANCO that this notice was "your final Trespass Notice," and stated that failure to take the required

^{4/} By letters dated June 30 and Aug. 4, 1993, ADEQ had notified ALANCO that it could not resume full operations until approval by that agency of an APP, because it was not established that the milling facility had been operated during the last 3 years and, in any case, in order to authorize discharges from its assay laboratory not covered by its existing "Notice of Disposal." Pending approval of an APP, ADEQ stated that ALANCO could engage in nondischarging activity, including completing necessary repairs and modifications to its milling facility.

^{5/} ALANCO informs us on appeal that it complied with the Area Manager's Aug. 24, 1993, decision by "not operat[ing] the Tombstone Mill since th[at] * * * decision." (SOR at 10.) See also SOR, Attachment 1, Ex. D! ¹⁶ ("[T]he plant is on a stand[!]by basis waiting for permitting").

^{6/} ALANCO did notify BLM by letter dated Aug. 26, 1993, received Sept. 8, 1993, that the "[m]inor non! compliance factors are being addressed."

action "will necessitate a formal Trespass Decision that will result in charges to include the cost of [the] removal of unauthorized facilities and reclamation, administrative fees and penalties under [43 C.F.R. §] 2920.1! 2." ALANCO received the second trespass notice on August 27, 1993, but there is no evidence that it ever appealed therefrom. 7/

ALANCO submitted a modified plan of operations covering interim repairs and modifications of its milling facility and other aspects of its millsite operation, dated September 11, 1993, on September 14, 1993. By letter dated September 24, 1993, BLM informed ALANCO that it could not accept the modified plan since it did not contain detailed information regarding such activity, and thus required submission of such information should ALANCO desire to proceed with that activity.

By letter dated October 4, 1993, the Area Manager notified ALANCO that it had a "Record of Noncompliance" with BLM in connection with its millsite operation because it had failed to fully comply with his August 1993 Notice of Noncompliance by not timely completing the required cleanup/removal. 8/

ALANCO submitted another modified plan of operations, dated October 8, 1993, on October 12, 1993, stating therein that it did not intend to engage in any interim repairs and/or modifications until ADEQ approval of an APP, and that its cleanup/removal activities were completed or ongoing. It also stated that, upon "re[s]cis[s]ion" of BLM's trespass proceedings, it would submit an amended plan of operations "for Operational Status upon approval of all necessary permitting as required by State and Federal regulations." In addition, ALANCO submitted a bond in the amount of \$19,000, as required by the Area Manager's second trespass notice, requesting that it be used to partially satisfy ALANCO's bonding requirement, should ADEQ approve an APP and BLM then approve an amended plan of operations.

By letter dated October 12, 1993, the Area Manager notified ALANCO that the \$19,000 bond would be held and no reclamation initiated by BLM "if the cleanup, * * * required as a condition of the trespass resolution, is found to be satisfactory in an examination of the site by the [BLM]." He further agreed to apply the bond in accordance with ALANCO's request should ADEQ approve an APP and should BLM then approve an amended plan for resuming full operation of the milling facility. 9/

7/ ALANCO did respond to BLM in its Aug. 26, 1993, letter, stating that, since it had a "full right of possession" under the general mining laws, it was not in trespass under 43 C.F.R. § 2920.1! 2.

8/ ALANCO's failure to complete the cleanup/removal had been disclosed by an Oct. 1, 1993, inspection of its operation. (Memorandum to the Files from BLM Geologist, dated Oct. 4, 1993 ("Compliance Inspection of the A[RMCO] Mill near Tombstone, Arizona").)

9/ On Dec. 28, 1993, BLM received a copy of ALANCO's application to ADEQ for an APP, dated Dec. 22, 1993, and received by ADEQ on that date. There is no evidence that ADEQ has ever approved an APP with respect to ALANCO's millsite operation. See Answer at 7 ("Th[e] application remains pending").

On October 22, 1993, BLM reinspected the millsite operation, finding that, while some cleanup had taken place, the work was ongoing. BLM also reported that no equipment had been removed since ALANCO had concluded, on advice of counsel, that it could leave any equipment that could be used in its millsite operation, pending approval of an amended plan.

On January 19, 1994, the Area Manager issued the "Trespass Decision" that is now under appeal, referring to the earlier trespass notice dated October 23, 1992, and to the trespass notice/notice of noncompliance dated August 24, 1993. The Decision stated that it constituted the "final decision as to the ongoing trespass." (Decision at 1.) He concluded that the "continuing unauthorized use [and occupancy] constitutes, under 43 C.F.R. § 2920.1-2, a trespass for which you are liable for removal, administrative costs, and back rent." *Id.* at 2. This liability was summarized on a document attached to the January 1994 decision, entitled "SUMMARY OF COSTS (Through January 18, 1994)." Therein, BLM itemized the charges for three categories of costs: "Removal of Property," "Administrative Charges," and "Back Rent Since January 1981" (emphasis deleted). In the case of removal, BLM listed the costs for it to remove three items of abandoned equipment (trailer, smelter/roaster, and propane storage tank), and other items and debris, which costs totalled \$5,150. ^{10/} In the case of administrative charges, BLM listed various BLM employee and related costs, which totalled \$3,435.45. In the case of back rent, BLM stated that the "[u]nauthorized use began when [a] * * * plan [of operations] became required under 43 C.F.R. § 3809.1! 8 but was not submitted," ^{11/} and that the rent for the intervening 13! year period, as determined by a January 6, 1994, BLM appraisal, was \$20,475 (or \$1,575/year).

In order to settle the trespass, the Area Manager provided, in his January 1994 decision, at page 2:

PLEASE TAKE NOTICE that (a) all said trespass liability is required to be paid, or (b) the unauthorized property on the millsite is required to be removed and administrative charges and back rent paid, on or prior to February 28, 1994. If neither occurs by such time, the United States may, in order to prevent further trespass, and without any additional notice of any kind whatsoever and without liability, remove all unauthorized property from the millsite at the expense of the owner thereof, using

^{10/} The Area Manager stated that liability for removal of the equipment pertained "regardless of its usability in future operations that may be planned," but noted that ALANCO would not have to remove "fixtures" while ADEQ was processing its application for an APP and presumably pending final action by BLM on its amended plan of operations.

^{11/} BLM thus referred to the fact that a plan of operations became a requirement in the case of existing operations on millsite claims, with the promulgation of 43 C.F.R. § 3809.1! 8, effective Jan. 1, 1981. *See* 45 Fed. Reg. 78902, 78909 (Nov. 26, 1980).

in part the cashier's check * * * submitted as a reclamation bond on October 12, 1993, as an offset to agency costs.

The Area Manager thus required ALANCO either to remove its property and pay only the administrative costs and back rent (\$23,910.45, or pay the administrative costs, back rent, and the costs that BLM would incur if BLM removed ALANCO's property (\$29,060.45)). Finally, the Area Manager stated that "[f]ailure to remove said property [or, presumably, to pay the costs thereof,] and [otherwise] resolve your trespass liability by the removal date may also result in trespass penalties under 43 C.F.R. § 2920.1! 2 and/or a citation under 43 C.F.R. § 9262.1." *Id.* ALANCO appealed timely from the Area Manager's January 1994 decision. 12/

In its SOR, ALANCO principally contends that BLM has no authority under 43 C.F.R. § 2920.1! 2 to charge it with trespass for unauthorized use and occupancy of the public lands. ALANCO argues that it was engaged in lawful activity, on its properly located and maintained millsite claims, that is "specifically authorized under other laws or regulations," i.e., section 15 of the Mining Law of 1872, 30 U.S.C. § 42 (1994). (SOR at 5 (quoting from 43 C.F.R. § 2920.1! 1).) It concludes that such activity was therefore not subject to authorization under 43 C.F.R. Part 2920, or, absent such authorization, a charge of trespass under 43 C.F.R. § 2920.1! 2. ALANCO further argues that to allow BLM to charge it with trespass will "impair" its rights under section 15 of the Mining Law of 1872, contrary to section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1994), which is a significant part of the animating authority for the regulations promulgated at 43 C.F.R. Part 2920. Rather, ALANCO asserts that its activity on the millsite claims is subject only to regulation pursuant to the surface management regulations at 43 C.F.R. Subpart 3809, and indicates that, when it engages in such activity without the prior approval of a required plan of operations, BLM's exclusive remedy is to issue a notice of noncompliance pursuant to 43 C.F.R. § 3809.3! 2.

BLM counters, contending that 43 C.F.R. Subpart 3809 does not constitute the "universe of applicable sanctions," and that, having failed to obtain an approved plan of operations, it properly charged ALANCO with trespass pursuant to 43 C.F.R. § 2920.1! 2 since ALANCO's activity was not in fact, at the time of the Area Manager's January 1994 decision and before, "specifically authorized under other laws or regulations." (Answer at 9, 15 (quoting from 43 C.F.R. § 2920.1! 1).)

[1] Section 303(g) of FLPMA, 43 U.S.C. § 1733(g) (1994), provides simply that: "The use, occupancy, or development of any portion of the public lands contrary to any regulation of the Secretary [of the Interior] * * * is unlawful and prohibited." Implementing regulations, appearing at

12/ By Order dated Mar. 29, 1994, we stayed, at ALANCO's request, the effect of the Area Manager's January 1994 decision pending our disposition of its appeal.

43 C.F.R. § 2920.1! 2, provide that: "Any use, occupancy, or development of the public lands * * * without authorization under the procedures in § 2920.1! 1 of [43 C.F.R.], shall be considered a trespass." ^{13/} 43 C.F.R. § 2920.1! 2(a). These regulations require that BLM notify the responsible party of the trespass, and hold him liable for "administrative costs" BLM incurred as a result of the trespass, the "fair market value rental" of the affected land "for the current year and past years of trespass," and "rehabilitat[ion] and stabiliz[ation]" of the affected land (or the costs incurred by BLM when that is not done timely). ^{14/} Id.; see Summit Quest, Inc., 120 IBLA 374, 377 (1991). Also, 43 C.F.R. § 2920.1! 2(e) provides for civil and/or criminal penalties.

The applicability of 43 C.F.R. § 2920.1! 2 "hinges on whether the use, occupancy, or development [of the public lands] was without authorization `under the procedures in § 2920.1! 1 [of 43 C.F.R.].'" William H. Snavelly, 136 IBLA 350, 356 (1996) (quoting from 43 C.F.R. § 2920.1! 2(a)). In Snavelly, we upheld a trespass charge where appellant's use and occupancy in connection with his milling operation was no longer authorized because the claim had been extinguished by operation of law when Snavelly failed to pay annual rental. 43 C.F.R. § 2920.1! 1 in turn provides that: "Any use not specifically authorized under other laws or regulations * * * may be authorized under this part." ^{15/} Thus, where use and occupancy of the public lands is "specifically authorized under other laws or regulations," engaging in such activity without authorization under 43 C.F.R. Part 2920 will not constitute a trespass under 43 C.F.R. § 2920.1! 2.

We are not persuaded that ALANCO's milling and related activity could, absent an approved plan of operations, be authorized under 43 C.F.R. Part 2920, thus rendering its failure to obtain such authorization a trespass under 43 C.F.R. § 2920.1! 2. BLM provides neither support nor justification for this position. It presents no evidence that 43 C.F.R. Part 2920 was intended to have any applicability in the context of mining/milling and related activity, which is already the domain of 43 C.F.R. Subpart 3809. We conclude that 43 C.F.R. Part 2920 was intended to serve as a distinct means of authorizing activity that is not subject, under any circumstances, to authorization under another law or regulation, and not to serve as an independent alternate source of authority when authorization

^{13/} The only exception is "casual use," which is defined as "any short term noncommercial activity which does not cause appreciable damage or disturbance to the public lands." 43 C.F.R. §§ 2920.0! 5(k) and 2920.1! 2(a).

^{14/} It is clear that the Area Manager's determination of "liability," in his January 1994 decision, tracks 43 C.F.R. § 2920.1! 2(a).

^{15/} The "part" referred to is 43 C.F.R. Part 2920, which was promulgated pursuant to sections 302, 303, and 310 of FLPMA, 43 U.S.C. §§ 1732, 1733, and 1740 (1994), and generally provides for issuing leases, permits, and easements for various purposes. See 43 C.F.R. §§ 2920.0! 3 and 2920.1! 1.

pursuant to other law or regulation has not in fact been obtained. Juliet Marsh Brown, 64 IBLA 379, 382 (1982). ^{16/}

ALANCO's use and occupancy in connection with its millsite operation was "specifically authorized" under section 15 of the Mining Law of 1872, where it occurred within the confines of the ARMCO millsite claim group. See 30 U.S.C. § 42 (1994); Kershner v. Trinidad Milling & Mining Co., 201 P. 1055, 1058! 59 (N.M. 1921) ("[30 U.S.C. § 42 (1994)] is a grant of a right to take possession of the nonmineral lands of the United States for such purposes and to maintain same against all intruders"); 1 Am. L. of Mining § 32.06[3][c] (2d ed. 1996). Due to the existence of that authority, such activity could not, and did not, fall within the ambit of 43 C.F.R. § 2920.1! 1, and, in the absence of the requirement of authorization under 43 C.F.R. Part 2920, could not form the basis for a charge of trespass under 43 C.F.R. § 2920.1! 2. Mr. & Mrs. Michael Bosch, 119 IBLA 370, 372, 374 (1991). In these circumstances, it is irrelevant that ALANCO's use and occupancy had never been authorized by BLM in the form of prior approval of a plan of operations pursuant to 43 C.F.R. Subpart 3809, because a finding of trespass under 43 C.F.R. § 2920.1! 2 must hinge on ALANCO's failure to obtain authorization under 43 C.F.R. Part 2920, not 43 C.F.R. Subpart 3809. Thus, a finding of trespass under 43 C.F.R. § 2920.1! 2 could not be predicated on the failure to obtain an approved plan of operations required by 43 C.F.R. Subpart 3809 because 43 C.F.R. Part 2920 is simply not applicable to that situation.

In Summit Quest, we held that it was improper for BLM to charge a party with trespass and assess liability under 43 C.F.R. § 2920.1! 2 where it had engaged in commercial recreational use on the public lands without obtaining a special recreational use permit, as specifically authorized under 43 C.F.R. Subpart 8372, and thus had violated 43 C.F.R. § 8372.0! 7(a). In these circumstances, we held: "We find no basis for applying the penalties of 43 C.F.R. § 2920.1! 2." 120 IBLA at 378. In so holding, we particularly noted that, in promulgating 43 C.F.R. §§ 2920.1! 1 and 2920.1! 2, the Department had stated that this rulemaking was "applicable only to activities authorized under 43 C.F.R. Part 2920 and has no impact on other areas, i.e., grazing trespass, mineral trespass, timber

^{16/} In this regard, we distinguish Wayne D. Klump, 130 IBLA 98, 101, 103 (1994), appeal dismissed, Klump v. Babbitt, No. 94! 578 TUC RMB (D. Ariz. May 19, 1995), appeal filed, No. 95! 16109 (9th Cir. May 30, 1995), and Karry K. Klump, 123 IBLA 377, 380 (1992), since they both involved a situation where the activity, i.e., construction of a road, was subject not only to authorization under 43 C.F.R. Subpart 3809, but also to issuance of a right! of! way under 43 C.F.R. Part 2800, and thus the claimant could be charged with trespass, under 43 C.F.R. § 2801.3, for failure to obtain a right! of! way. But see Ronald A. Pene, 135 IBLA 143, 153 (1996). Here, 43 C.F.R. Part 2920 does not provide dual authority for ALANCO's milling and related activity.

trespass." 120 IBLA at 378 (quoting 52 Fed. Reg. 49114! 15 (Dec. 29, 1987)). Therefore, we hold that it was improper for the Area Manager, in his January 1994 decision, to charge ALANCO with a trespass, holding it liable for trespass damages and related administrative charges, under 43 C.F.R. § 2920.1! 2. See Summit Quest, Inc., 120 IBLA at 378. To hold otherwise would result in the owner of a valid millsite, or (for that matter) mining, claim being subjected to trespass liability under 43 C.F.R. § 2920.1! 2 for permissible activities undertaken in conjunction with his claim.

Our holding here, of course, assumes that ALANCO was, in all respects, properly occupying the land under valid millsite claims, as required by the general mining laws, and for the purpose of prospecting, mining, or processing and uses reasonably incident thereto, as required by section 4(a) of the Act of July 23, 1955 (Surface Resources Act), 30 U.S.C. § 612(a) (1994). 17/

Accordingly, we reverse the Area Manager's January 1994 decision, charging ALANCO, pursuant to 43 C.F.R. § 2920.1! 2, with trespass, and requiring settlement of that trespass, with respect to its use and occupancy on the ARMCO millsite claim group. 18/

17/ ALANCO's activities on its millsite claims are subject to the surface management regulations (43 C.F.R. Subpart 3809), which seek to generally prevent unnecessary or undue degradation of the public lands. 43 C.F.R. § 3809.0! 2; B.K. Lowndes, 113 IBLA 321, 325 (1990). Under those regulations, BLM may, as it did here on Aug. 24, 1993, issue a notice of noncompliance, requiring corrective action, where regulated activity is occurring without the benefit of an approved plan of operations, 43 C.F.R. § 3809.3-2; see also Pierre J. Ott, 122 IBLA 371 (1992), and Richard C. Behnke, 122 IBLA 131, 139 (1992), and, when the claimant fails to correct the situation, BLM, through the U.S. Attorney, may institute an appropriate judicial proceeding, cf. United States v. Burnett, 750 F. Supp. 1029, 1033 (D. Idaho 1990) (Forest Service surface management regulations).

ALANCO's activities are also subject to the regulations (43 C.F.R. Subpart 3715), promulgated effective Aug. 15, 1996 (61 Fed. Reg. 37115 (July 16, 1996)), which primarily aim to limit the residential occupancy of mining and millsite claims to that permitted by section 4(a) of the Surface Resources Act. See 43 C.F.R. §§ 3715.0! 1 and 3715.0! 5. These regulations also provide for administrative and, failing that, judicial relief. See 43 C.F.R. §§ 3715.7! 1 and 3715.7! 2. 18/ ALANCO also asks that we direct BLM to approve its plan of operations subject only to issuance of an APP by ADEQ. (SOR at 13.) We decline to do so since the BLM decision under appeal concerned only its attempt to resolve ALANCO's purported trespass liability. No issue on appeal involves the propriety of BLM's adjudication of ALANCO's plan of operations, and the Board has no general supervisory authority over BLM. See Headwaters, Inc., 101 IBLA 234, 239 (1988).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed.

Gail M. Frazier
Administrative Judge

I concur.

T. Britt Price
Administrative Judge

